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February 6, 2006

NEPA Draft Report Comments
c/o NEPA Task Force
Committee on Resources
1324 Longworth House Office Building
Washington, DC

Reference: NEPA Draft Initial Findings and Draft Recommendations Dec. 21, 2005

To Whom It May Concern:

Thank you for the opportunity to submit comments on House Resources Committee NEPA Task Force's Draft Initial Findings and Recommendations, released on December 21, 2005. The American Forest & Paper Association (AF&PA) is the national trade association of the forest, pulp, paper, paperboard, and wood products industry.

As requested, we would like to offer our comments on the specific draft recommendations in the report. We support all recommendations on which we have not specifically commented. We also note that CEQ has the authority on a number of these issues to engage in rulemaking without amending NEPA itself.

Recommendation 1.1
We support this recommendation and believe that this is one of the most important recommendations by the task force. As currently implemented, federal agencies with high political controversy treat almost all actions as "major federal actions." Of course, any effort to clarify "major federal action" must also address "significantly affected the quality of the human environment." We recommend that there be one definition for the entire phrase to increase precision in the application of this concept by federal agencies. Additionally, the Ninth Circuit has developed standards that require an environmental impact statement (EIS) if the project "may" or arguably has significant environmental impacts, instead of deferring to the expert agency's judgment and reserving EISs for projects that demonstrably "do" have significant environmental consequences. *E.g., Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 121-13 (9th Cir. 1998). At a minimum, NEPA legislation should eliminate the stacked deck in favor of EISs, and the delays and costs that dubious EISs entail.

A related issue concerns whether agencies must prepare a supplemental EIS when new information becomes available about an ongoing project where the agency has previously prepared an EIS, that is, the agency had already concluded that project was a "major federal action" and had analyzed its impacts. Where an action remains "ongoing," it is unnecessarily costly and disruptive to interrupt the process to prepare a supplemental EIS. The Supreme Court concluded in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 2385 (2004), that where an agency has completed the "major federal action," there is no requirement for supplementation of the EIS. Congress should apply a similar principle to ongoing actions and provide that since the agency has already analyzed the

significant effects on the quality of the human environment, the agency has satisfied the requirement for a "detailed statement." The agency must consider new information independently to determine whether it qualifies on its own as a major federal action requiring an EIS.

Recommendation 1.2
We support more timely completion of procedural NEPA duties. However, we are concerned that specific timelines for completion of NEPA documents may not always prove useful in expediting the process, and could focus agency efforts on meeting timeframes rather than adequately meeting procedural and substantive requirements of the various laws and regulations.

Recommendation 1.3
We support this recommendation, particularly statutory recognition of the categorical exclusion (CE). CEs are an integral part of a triage system established by CEQ to allocate scarce NEPA resources more wisely. Under that triage system: (1) an EIS is prepared if the federal proposal would significantly affect environmental quality (40 C.F.R. 1502.3, 1508.27); (2) a more concise environmental assessment (EA) is prepared on proposed federal actions not within a CE and about which the agency is not sure whether the environmental effects will be "significant" and thus require an EIS (*id.* §§ 1501.3, 1507.3(b), 1508.9); and (3) federal agencies must identify categories of actions "[w]hich normally do not require either an [EIS] or an [EA] (categorical exclusions (§ 1508.4))." *Id.* § 1507.3(b)(2)(ii). The use of CEs allows limited NEPA resources to be focused on projects with truly significant adverse environmental impacts. *See Citizens' Comm. To Save Our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1022-23 (10th Cir. 2002); Executive Order 11991 § 3(h) (NEPA rules "will be designed" in part to "reduce paperwork...in order to emphasize the need to focus on real environmental issues"), 42 U.S.C. 4321 note. We would look to the amendment to specifically address the different purposes of the three levels of analysis and documentation. We remain particularly concerned that EAs already approach the scope of environmental impact statements. We recommend that any amendment specifically limit the scope of an EA.

Recommendation 1.4
We have significant reservations about simply adding the CEQ regulation on supplementation of NEPA documents into the statute. In this modern day, with agencies being bombarded by new information weekly, there must be explicit limits on when supplemental environmental analysis is required or in the words of the Supreme Court it will "render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." Marsh v. Oregon Natural Resource Council, 490 U.S. 360, 373-74 (1989). The CEQ regulation has poorly defined limits on supplemental analysis and it should not be added to the statute in its present form.

Recommendation 2.1
We support amending the regulations to give weight to substantive comments and to discourage mass mailing and campaign responses to NEPA documents and federal proposals for action. It would also be helpful for Congress to emphasize that the purpose of NEPA is to inform agency decision-makers, and the public, of the environmental consequences of their proposed actions. While the public may comment on a draft EIS, this process is not a referendum on the proposed action but rather is a process to obtain additional information on the environmental consequences. Obviously, the public at large may

comment on the proposed agency action, but Congress should be clear that the merits of the agency action are not within the scope of NEPA, but rather are to be addressed under the agency decision making process. The public should be educated that comments on a draft environmental analysis should focus on the content and methodology of the analysis.

Recommendation 3.2
We strongly support this recommendation. Duplication of analysis and coordination requirements is a waste of time and scarce public financial resources and this recommendation would help eliminate that duplication.

Recommendation 4.1
We understand that your statistics suggest that only a small portion of NEPA analyses are challenged in federal court. However, judicial interpretations of NEPA have far greater impact than just the case at hand. NEPA cases truly epitomize the axiom of "bad facts make bad law." One NEPA decision binds federal agencies throughout an entire federal appeals circuit and influences judicial and agency decisions throughout the country. An example is the *Lands Council* decision described in our comments on Recommendation 8.1 below. For the Forest Service, violations of NEPA are by far the most common claims in litigation. During the past 13 years, over 400 lawsuits have been filed with NEPA claims, resulting in often ambiguous, conflicting and transient standards with which the agency must attempt to comply.

That being said, we see no need for a stand-alone judicial review provision in NEPA. The Administrative Procedure Act provides a sufficient framework for judicial review, with two caveats: (1) courts must give CEQ and agency decisions deference and (2) a level playing field must be established. With regard to deference, Congress must ensure that federal judges understand that their role in NEPA cases is no different than in any other administrative record case. For example, the law should require that plaintiffs demonstrate that alleged missing information was actually essential to a reasoned decision by the agency. With regard to a level playing field, we suggest two improvements. First, Congress should clarify that having an economic interest in the agency action does not disqualify an entity from standing to challenge the adequacy of an agency's NEPA compliance. Second, Congress should clarify that private persons whose interests would be affected have a right to intervene to help defend the adequacy of NEPA compliance. A legislative fix is needed to cure the unfair law in the Ninth Circuit (and others, such as the Seventh Circuit) that the private sector cannot intervene to defend the adequacy of an agency's NEPA compliance. *E.g., Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489 (9th Cir. 1995). Other courts have criticized the Ninth Circuit's unnecessarily narrow approach to intervention on the NEPA merits. *See Kleissler v. U.S. Forest Service*, 157 F.3d 964, 971-74 (3d Cir. 1998). The Ninth Circuit's analysis ignores that the prospective holder of a federal contract or permit is injured if the NEPA documentation on that contract or permit is found deficient, and the contract or permit is either delayed or not issued at all. *See* Note, S*tacking the Deck Against "Purely Economic Interests": Inequity and Intervention in Environmental Litigation*, 35 GA. L. REV. 1219 (2001).

Recommendation 4.2
We support the need for timely dissemination of court decisions and their applicability to federal planning and documentation. However, we do not support this recommendation. We believe that a

CEQ "clearing house" could cause additional administrative procedures and become an obstacle for agencies to consider and approve federal projects. As an alternative, we recommend that CEQ be directed to conduct a rulemaking every three years to address NEPA interpretations by the federal courts of appeals.

Recommendation 5.2
We support the specific recommendation to address the impact of not taking any action and believe it is a concept that Congress should clarify or else the courts will. While CEQ regulations directing analysis of impacts resulting from inaction would be helpful, statutory language would establish the concept once and for all. We are concerned however with the statement in the explanation of the recommendation which states: "An agency would be *required* to reject this alternative if on balance the impacts of not undertaking a project or decision would outweigh the impacts of executing the project or decision." (Emphasis added.) While we fully support this statement in principle, we oppose inclusion of such a directive in NEPA. As the Supreme Court recognized, NEPA is strictly a procedural statute ensuring that federal agencies on the environmental effects of a proposed action so that the agency may make an informed decision; the law does not mandate any "particular substantive environmental results." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). We prefer to keep NEPA procedural and thus recommend that the Task Force describe this recommendation "making it likely an agency would reject this alternative" or "an agency would be justified in rejecting this alternative." In this manner, Congress recognizes the agency's authority in a manner that, as the Supreme Court described in *Methow Valley*, "inevitably brings pressure to bear on agencies." *Robertson v. Methow Valley Citizens Council* at 349.

Recommendation 5.3
We think that this recommendation, as stated, is unclear. CEQ should not have the authority to require an agency to implement mitigation on its own actions, let alone impose mitigation on a license or permit issued to a private applicant. Mitigation should certainly be considered by agencies, but should only be mandatory at the agency's discretion, for the reasons stated above under Recommendation 5.2 concerning the procedural nature of NEPA.

Additional Comment on Group 5
Since the Task Force is considering recommendations on analysis of alternatives to the proposed action, we suggest that an additional improvement would be to eliminate the requirement that an EA must consider alternatives. An EA is designed merely to ascertain whether the proposed action is a "major federal action significantly affecting the quality of the human environment." Whether or not there is a reasonable alternative if the action is not major should be irrelevant as far as NEPA is concerned. However, courts have read section 102(2)(E) of NEPA concerning alternatives as an independent requirement from 102(2)(C) concerning including a "detailed statement" for every "major federal action significantly affecting the quality of the human environment." We suggest merely moving section 102(2)(E) into section 102(2)(C) as subparagraph (vi) and then renumbering paragraphs 102(2)(F)-(I) accordingly. This makes it clear that only the "detailed statement," that is, the EIS, must consider alternatives.

Recommendation 6.1
We strongly support agency consultation with stakeholders. However, we believe that NEPA is first and foremost a public disclosure law as opposed to a public participation law. Many other laws require various forms of public participation in agency planning and decision-making and NEPA should not be duplicative of these laws or impose additional requirements on agencies.

Recommendation 7.1
We do not support this recommendation. EPA already reviews agency EISs. Although the EPA review is supposedly limited to assessing the adequacy of the analysis, all too often EPA seeks to influence the substance of the ultimate agency decision as well. A CEQ role would add confusion and create additional layers of review and bureaucracy, and may well result yet more pressure on the agency to make a particular decision.

Recommendation 8.1
We strongly support legislative and regulatory relief to place reasonable sideboards on addressing the cumulative impacts of other actions in a NEPA document on a particular proposed action. The Ninth Circuit has held that NEPA requires the Forest Service to provide an individualized description of the environmental impacts of each past timber project, and of other possible future timber harvests, in a NEPA statement on one proposed timber sale. *The Lands Council v. Powell*, 395 F.3d 1019, 1026-29 (9th Cir. 2005). This seems contrary to the common sense position, adopted by the Supreme Court, that NEPA documents should focus on the environmental impacts caused by the proposed action and that the agency can control. *Department of Transportation v. Public Citizen*, 541 U.S. 752,764-70 (2004). There is little sense in parsing out the environmental impacts of separate completed actions, and agencies frequently lack such information. Past actions should not be subject to detailed analysis in an EIS, but rather should only be generally addressed as part of the existing environmental conditions or environmental baseline. This recommendation would return analysis of past actions to the proper place in the EIS. We recommend that the Task Force restate the recommendation to avoid any confusion of your intent: "Recommendation 8.1: <u>Amend NEPA to clarify that agencies evaluate the effect of past actions in the assessment of existing environmental conditions.</u>" This would avoid any perception that agencies should employ the same methodology for analysis of cumulative impacts and assessment of existing environmental conditions.

Recommendation 8.2
We strongly support any steps by Congress to either address the treatment of cumulative impacts in statutory language or in directives to CEQ for rulemakng. The Ninth Circuit's view is that NEPA rules require detailed assessment of the cumulative impacts of possible future federal actions. E.g., *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993-97 (9th Cir. 2004). This view results in much speculative and duplicative analysis. NEPA only requires analysis of an action after it has been "proposed" and when the project's known dimensions allow environmental impacts to be more accurately predicted. Accordingly, NEPA should give the agency the discretion to address actions in a single NEPA document or to address the then-known cumulative impacts in the NEPA document on the later-in-time action. *Kleppe v. Sierra Club*, 427 U.S. 390, 401-02, 410-15 and notes 20 and 26 (1976). Since the courts are not bound by any requirement for consistency, federal agencies, such as the U.S. Forest Service, are faced with ever-expanding directives for conducting these cumulative impact

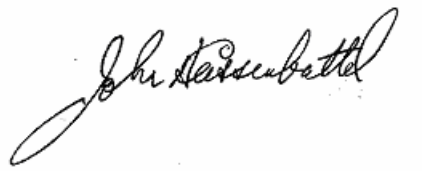
analyses. Without cogent rules explaining geographic and temporal scope of the analysis, courts are free to demand whatever scope the particular judge feels comfortable with.

The Ninth Circuit also frequently overrides the Forest Service's judgment on the proper geographic scope of cumulative impact analysis. E.g., *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 973-74 (9th Cir. 2002); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895-97 (9th Cir. 2002). NEPA legislation should re-establish a "rule of reason" on NEPA compliance and should reject the overly aggressive interpretations of NEPA by many Ninth Circuit panels. One conceptual problem created by the Ninth Circuit's expansive view of "cumulative impact" duties is that the cumulative impacts of other actions tend to drown out the impacts of the project under consideration and the impacts the agency can control now. One practical problem is that, for the Forest Service and other federal agencies, getting any NEPA document approved by the Ninth Circuit is a gamble with long odds.

Recommendations 9.1, 9.2, 9.3
We support these recommendations. These studies are very much needed and the information should not only be available to Congress, but to the public as well.

Thank you for the opportunity to provide these comments and we look forward to working with Congress on these issues.

Sincerely,



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